Arab-Malaysian Finance Bhd v Mohd Zakaria bin Salim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-03-85 OF 1998
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
21 FEBRUARY 2002

Civil Procedure *— Service — Creditor's petition — Service of photostat copy of creditor's petition — Non-compliance with Bankruptcy Rules 1969 r 110 — Consequence of breach — Whether mere irregularity — Bankruptcy Act 1967 s 131*

The appellant was the judgment creditor. It took out a creditor's petition to declare the respondent a bankrupt essentially for non-satisfaction of a debt due under a judgment. The appellant served a copy of the creditor's petition on the respondent by way of substituted service. However, an unsealed copy of the petition was posted on the respondent's premises. A mere photostat copy was posted. The respondent took out an application to set aside the creditor's petition on the ground that the service of the petition was contrary to r 110 of the Bankruptcy Rules 1969 ('the Rules'). The respondent's application was allowed in the High Court and the appellant appealed.

Held, allowing the appeal with costs:

The time has long passed when courts are troubled by the question as to whether in the initiation or prosecution or conduct of proceedings, the breach of a rule of court amounts to a mere irregularity or a nullity. The service of a photostat copy of a creditor's petition does not vitiate bankruptcy proceedings in toto. It was for the respondent to show in a clear and convincing manner that he had suffered some serious prejudice or that a miscarriage of justice was occasioned to him by reason of the appellant's failure to comply with r 110 of the Rules. No material was placed in any manner to discharge this burden (see pp 339H–I, 340D–E); *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187, *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 and *Nicholls v Nicholls* [1997] 147 NLJ 61 followed, *Re v David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127 not followed.

[Bahasa Malaysia summary

Perayu adalah pemiutang penghakiman. Ia telah mengeluarkan satu petisyen pemiutang untuk mengisytiharkan responden seorang bankrap pada dasarnya kerana tidak membuat pembayaran hutang yang tertunggak di bawah satu penghakiman. Perayu telah menyampaikan satu salinan petisyen pemiutang tersebut ke atas responden melalui penyampaian gantian. Namun begitu, satu salinan petisyen yang tidak dimeterai telah diposkan ke premis responden. Hanya salinan fotostat telah diposkan. Responden telah mengeluarkan satu permohonan untuk mengenepikan petisyen

pemiutang tersebut atas alasan bahawa penyampaian petisyen tersebut adalah bertentangan dengan k 110 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah tersebut'). Permohonan responden telah dibenarkan di Mahkamah Tinggi dan perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut:

Masa telah lama berlalu sejak mahkamah mengalami masalah tentang persoalan sama ada dalam pemulaan atau pendakwaan atau pengendalian prosiding, pelanggaran satu kaedah mahkamah hanya membentuk satu luar aturan atau pembatalan. Penyampaian sesalinan fotostat petisyen pemiutang tidak menjadikan prosiding kebankrapan tersebut tidak sah in toto. Adalah untuk responden menunjukkan secara jelas dan meyakinkan bahawa beliau telah mengalami prasangka yang serius atau di mana satu kesalahan perlakuan keadilan telah berlaku ke atas beliau oleh sebab kegagalan perayu mematuhi k 110 Kaedah tersebut. Tiada bahan material telah dikemukakan dalam apa carapun untuk melepaskan beban ini (lihat ms 339H–I, 340D–E); *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187, *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 dan *Nicholls v Nicholls* [1997] 147 NLJ 61 diikut, *Re v David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127 tidak diikut.]

Notes

For cases on service, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5224–5354.

Cases referred to

Au-Yong v Dicum & Anor [1963] MLJ 349 (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (folld)
Maril-Rionebel (M) Sdn Bhd v Perdana Merchant Bankers Berhad [2001] 4 MLJ 187 (folld)
MPLM Muthiah Chettiar, Re; ex p SPN Ramanathan Chettiar [1938] MLJ 233 (refd)
Nicholls v Nicholls [1997] 147 NLJ 61 (folld)
Re v David, ex p United Asian Bank Bhd [1991] 2 MLJ 127 (not folld)

Legislation referred to

Bankruptcy Act 1967 s 131
Bankruptcy Rules 1969 r 110
Rules of the High Court 1980

Appeal from: Bankruptcy Notice No 29–719 of 1996 (High Court, Muar)

A *C Sukumaran* (*Ana Shahrana bte Annuar* with him) (*C Sukumaran & Co*) for the appellant.

Mohd Ashri Rais (*Mohd Ashri Rais & Co*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This appeal raises a short point of procedure in bankruptcy. The appellant before us was B the judgment creditor in the court below. It took out a creditor's petition to declare the respondent a bankrupt essentially for non-satisfaction of a debt due under a judgment dated 5 December 1995.

The appellant served a copy of the creditor's petition on the respondent by substituted service but it was not a sealed copy of the petition that was C posted on the respondent's premises. It was a mere photostat copy.

The respondent took out an application to set aside the creditor's petition on the ground that the service of the petition was contrary to r 110 of the Bankruptcy Rules 1969. That rule reads as follows:

> (1) If the court is satisfied by affidavit or other evidence on oath that prompt D personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.
>
> (2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

E There is no doubt that the rule was breached. But the question is what is the consequence of the breach?

The appellant argues that the breach only amounts to a mere irregularity under s 131 of the Bankruptcy Act 1967 which reads as follows:

> F No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

In *Au-Yong v Dicum & Anor* [1963] MLJ 349, the Malaysian Court of G Appeal held that a failure to deliver a sealed copy of the creditor's petition was a mere irregularity and curable under the equipollent precursor of s 131 of the Bankruptcy Act 1967. The court there distinguished and refused to apply an earlier decision of Sir Percy McElwaine CJ in *Re MPLM Muthiah Chettiar; ex p SPN Ramanathan Chettiar* [1938] MLJ 233.

H The respondent however argues that the departure in the present instance is not a mere irregularity but a nullity and counsel for the respondent cited *Re v David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127, a decision of Zakaria Yatim J (as he then was).

It is our judgment that the time has long passed when courts are troubled by the question as to whether in the initiation or prosecution or I conduct of proceedings, the breach of a rule of court amounts to a mere irregularity or a nullity. The modern approach is exemplified by the judgment of Lord Woolf MR in *Nicholls v Nicholls* [1997] 147 NLJ 61. That

was a case of contempt of court where the breach of an order made in matrimonial proceedings was the subject matter of the complaint. It was held, after a discussion of the earlier authorities on the subject, that a breach of a rule of the court, even in such a serious matter as contempt of court, would be overlooked unless such breach produced a miscarriage of justice or serious prejudice to the alleged contemnor. *Nicholls v Nicholls* was applied by our Federal Court in the judgment of Mohammed Azmi FCJ in a case concerning the non-observance of the requirements of the Rules of the High Court 1980, see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565.

Further, very recently this court in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 took the same approach to a breach of the Companies Winding Up Rules which is not dissimilar in context and consequence to adjectival bankruptcy legislation.

Having regard to the authorities referred to a moment ago, we are satisfied that the decision of the learned senior assistant registrar and the learned judge in granting the respondent the order he sought was an error. We are unable to agree with the conclusion of the High Court that the service of a photostat copy of a creditor's petition vitiates bankruptcy proceedings in toto. It is our view that it was for the respondent to show in a clear and convincing manner that he has suffered some serious prejudice or that a miscarriage of justice was occasioned to him by reason of the appellant's failure to comply with r 110 of the Bankruptcy Rules 1969. It is conceded by En Mohd Ashri Rais, counsel for the respondent that no material was placed before the High Court in any manner to discharge this burden.

The upshot is that the appeal is accordingly allowed and the usual orders are made in consequence of a successful appeal. The order of the learned senior assistant registrar dated 5 May 1998 and that of the learned judge dated 27 August 1998 are set aside. The creditors' petition is to be fixed for mention on 22 February 2002 at 9am in the Muar High Court to enable that court to fix a date for hearing of the petition. The costs here and in the court below are awarded to the appellant and the deposit is also to be refunded to it.

Appeal allowed with costs.

Reported by Peter Ling